

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

AVERY DALLAPIAZZA,

Petitioner,

v.

Case No. 04-C-58

**MATTHEW FRANK
Secretary, Department of Corrections,**

Respondent.

ORDER DENYING CERTIFICATE OF APPEALABILITY

Avery Dallapiazza (“Dallapiazza”) is a prisoner incarcerated pursuant to a state court judgment. On January 20, 2004, he filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This case was randomly assigned to this court and all parties have consented to the full jurisdiction of a magistrate judge. On December 29, 2006, this court denied Dallapiazza’s petition as untimely filed. Dallapiazza had filed his petition more than one year beyond the statute of limitations set forth in 28 U.S.C. § 2244(d)(1). On January 23, 2007, Dallapiazza filed a notice of appeal.

Dallapiazza has not requested a certificate of appealability as is required by 28 U.S.C. §2253 and Federal Rule of Appellate Procedure 22(b). However, when a petitioner fails to properly request a COA, the court shall construe a notice of appeal as a request for a COA.

To obtain a COA, the petitioner must make “a substantial showing of the denial of a constitutional right.” Section 2253(c)(2). Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner

must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Relevant to this case, the Supreme Court has stated that,

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 478 (2000). In other words, both a procedural showing and a constitutional showing are necessary to obtain a COA. Id. at 484-85.

In regard to the court's procedural ruling, Dallapiazza plainly failed to comply with the strict time limits set forth in 28 U.S.C. § 2244(d), as explained in this court's decision. The petitioner has failed to show that jurists of reason would find this point debatable. Thus, Dallapiazza is not entitled to a certificate of appealability.

IT IS THEREFORE ORDERED that Dallapiazza's request for a certificate of appealability is **denied**.

Dated at Milwaukee, Wisconsin this 25th day of January, 2007.

s/AARON E. GOODSTEIN
U.S. Magistrate Judge